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No. 03-778

In The Supreme Court of the United States

THE ANTI-DEFAMATION LEAGUE AND SAUL ROSENTHAL,

Petitioners,

v.

WILLIAM QUIGLEY AND DOROTHY QUIGLEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the truth or falsity of speech relevant to whether the speech involves a matter of "public concern" under the First Amendment?

2. Are punitive damages authorized under the Federal Wiretap Act where a defendant relied in good faith upon the advice both of its own lawyers and of state prosecutors that its conduct did not violate the Act?

3. Are punitive damages authorized under the Federal Wiretap Act for defamatory use of illegally intercepted communications?

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REPLY TO BRIEF IN OPPOSITION

1. Respondents expressly conceded below, and do not deny here, that if Petitioners' speech about Respondents had been true, it surely would have involved a "matter of public concern." *See* Appendix to Petition for Writ of Certiorari ("Pet. App.") 63a. "The problem for ADL's position," said Respondents below, "is that none of [Petitioners' speech] was true." *Id.* A divided panel of the Tenth Circuit agreed, holding that Petitioners' speech did not involve a matter of public concern because it was false. The panel majority therefore denied Petitioners' speech the benefit of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974), which held that speech on a matter of public concern can be sanctioned with *punitive* damages only if uttered with "actual malice." As a result, the award of punitive damages was upheld even though the jury found that Petitioners "acted negligently in publishing the statement[s]," not with actual malice. *See, e.g.*, Appendix to Brief for Respondents in Opposition ("Opp. App.") 1a. By denying public concern status, and thus First Amendment protection, to *negligently* false speech, the panel majority effectively rejected *Gertz*. For "[i]f only true statements could be matters of public concern," as Judge Hartz noted in dissent, "public-concern doctrine would be an empty gesture, because true statements can *never* be the basis for a defamation cause of action." Pet. App. 62a; *see also Gertz*, 418 U.S. at 330 n.4 (same). The panel majority's ruling, not surprisingly, conflicts sharply with the other five circuits to have addressed this issue, all of which have been faithful to *Gertz*.

To obscure the obvious certworthiness of this important constitutional question, Respondents resort to seriously distorting the record below in two important respects. First, they falsely depict ADL as having intentionally fabricated and published known lies, readily satisfying the actual malice standard and, thus, presumably rendering pointless any remand by this Court for application of the correct constitutional standard. Second, they assert that Petitioners did not preserve the First Amendment "public concern" issue in the courts below. The record refutes both efforts. Respondents also make the legal argument that this Court has

already considered and rejected our submission that the truth or falsity of speech is irrelevant to the question whether it involves a matter of public concern. In fact, this Court's decision in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), did not address public concern doctrine at all, but instead considered the very different question of when a defamation plaintiff is a limited purpose public figure.

a. Respondents open their factual presentation with the claim that the Court must accept their one-sided view of the evidence, drawing all inferences favorable to them. Opp. 2. But "in cases raising First Amendment issues, [this Court has] repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)). The Tenth Circuit conducted, as Respondents themselves acknowledge, a "*de novo* review of the entire record," Opp. 13, and its opinion, not Respondents' tendentious statement, provides the factual backdrop for the legal issue presented here.

While most of the liberties taken in Respondents' factual account are immaterial to this Court's review,[1] Respondents'

[1] Typical of Respondents' mischaracterizations of the record is their repeated statement that "none of Rosenthal's more than 20 particularized defamatory statements made reference to the Aronsons' lawsuit." Opp. 8 n.11; *see id.* at 16. At his press conference, Rosenthal introduced his comments by referring to "the lawsuit we will discuss this morning," and concluded by stating that the "suit details the allegations which I have summarized for you this morning." 10th Circuit Court of Appeals Appendix ("C.A. App.") 5178-80. And his comments during the radio interview repeatedly referred to the Aronsons' lawsuit. *See* Pet. App. 19a ("[T]he allegations that are in the lawsuit are based on words which Mr. and Mrs. Quigley have spoken."). The court of appeals had no difficulty accepting the heretofore undisputed fact that "Rosenthal was discussing allegations made in a civil lawsuit filed against the Quigleys." Pet. App. 29a.

Similarly gross is Respondents' representation that "ADL . . . brought the filing of the [Aronsons'] lawsuit . . . to the papers' attention," a claim for

(Continued on following page)

repeated assertion that Petitioners acted "maliciously," Opp. 1, demands correction. According to Respondents, ADL "concocted the notion of the Quigleys' purported 'racial discrimination/harassment,'" and "then took that fabricated accusation, devised a sham lawsuit, and attempted to use the lawsuit as 'cover' for its public relations smear campaign." Opp. 17-18.

The court of appeals, and the record, tell a very different story. A Jewish couple came to ADL with a horrific story of a concerted anti-Semitic campaign by the Quigleys to drive them from their neighborhood. Not only were the Aronsons willing to tell their story publicly and under oath, they had numerous tape-recorded conversations in which Mrs. Quigley made highly offensive anti-Semitic comments and/or "mentioned taking some type of physical action toward the Aronsons or their home." Pet. App. 13a. ADL consulted with and engaged two respected local attorneys, who researched the legality of the interceptions,[2] reviewed the tapes and other evidence, and determined that a lawsuit against the Quigleys was warranted. ADL also brought the Aronsons' allegations to the attention of the local prosecutor's office, which independently researched the legality of the tapes, requested and received copies of tapes on an on-going basis, and used the tapes in investigating and indicting the Quigleys for ethnic

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which they cite the ADL's press advisory concerning its December 7, 1994 press conference. Opp. 8 n.9. In fact, the district court found that Rosenthal was first contacted on December 6, the very day the Aronsons filed suit, by a reporter from the *Denver Post* inquiring about the lawsuit, and planned his press conference and issued the press advisory *after that initial inquiry*. *See* Pet. App. 127a-128a. Both the *Denver Post* and *Rocky Mountain News* ran their own stories about the lawsuit the morning of December 7, prior to ADL's scheduled press conference. *See* Pet. App. 63a (Hartz, J., dissenting).

[2] Respondents attempt to cast doubt on this point, *see* Opp. 7 n.7, but the undisputed evidence in the record confirms that "Lozow's initial response was to determine whether it was legal for the Aronsons to overhear and record the Quigleys' cordless telephone conversations." Pet. App. 12a. He confirmed his legal research with a local prosecutor who agreed with this conclusion. *Id.*; *see also* Pet. App. 126a-127a (district court's findings). Respondents have cited no evidence whatever to the contrary.

intimidation. *See* Pet. App. 12a-13a, 20a, 127a. ADL relied on these things in publishing the Aronsons' allegations.

To be sure, Petitioners can be faulted, and have been faulted, for not listening to the tapes themselves, and they contest neither the findings below of negligence nor the imposition of substantial *compensatory* damages. But, as the district court emphasized no fewer than three separate times, Petitioners sought "to publicize what *they believed* to be plaintiffs' anti-Semitic conduct." Pet. App. 141a (emphasis added); *see also id.* at 138a, 149a. And Respondents' hysterical charges that the ADL "concocted" the Aronsons' claims of anti-Semitic harassment out of whole cloth and orchestrated the Aronsons, their lawyers, and the local prosecutor's office in a vicious "smear campaign" for ADL's own evil "self-aggrandiz[ement]" is itself a smear campaign.[3]

However the factual question of ADL's "actual malice" might be resolved on remand, the question presented here is purely legal: is negligently false speech, as a matter of law, not entitled to the protection the First Amendment accords to speech on a matter of public concern?[4]

b. According to Respondents, "ADL never argued at trial or on appeal that the First Amendment required the Quigleys to prove 'actual malice' to support punitive damages for a defamation claim." Opp. 15 n.19. In fact, Petitioners specifically argued to the court of appeals that, "as to punitive damages under the First Amendment, this Court must

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[3] Contrary to Respondents' assertion, Opp. 17-18, the court below never suggested that ADL had itself concocted anything. Rather, it faulted ADL only because ADL "knew or should have known" that the Aronsons' allegations were unfounded – i.e., ADL was negligent. Pet. App. 33a. And, indeed, the jury *specifically found* that ADL did not "procure" the Aronsons' interceptions. *See* Opp. App. 24a-26a.

[4] Respondents' reference, *see* Opp. 22, to the jury's findings of actual malice on wholly different claims that were reversed on appeal is without merit. Because it ruled that plaintiffs need not demonstrate actual malice, the Tenth Circuit did not inquire into whether actual malice had been shown. *See* Pet. App. 33a n.7.

independently evaluate the record to determine whether the Quigleys produced clear and convincing evidence of the defendants' 'actual malice.'" Petitioners/Appellants' 10th Circuit Court of Appeals Opening Brief ("Pet. C.A. Br.") 21.[5] The panel majority rejected this argument on the sole ground that the speech at issue "did not involve matters of public concern." Pet. App. 33a & n.7; *see id.* at 55a. Respondents also represent that "ADL failed to submit a punitive damages instruction for actual malice and it received the jury instructions it did request." Opp. 21. This representation is, if not false, highly misleading. Petitioners requested jury instructions requiring findings of actual malice as an element of liability (and thus as a prerequisite to both compensatory and punitive damages). C.A. App. 398-99, 402-04, 407. The district court, however, refused to issue the requested instructions, observing, ironically enough, that "I gather that is submitted for some purpose of preserving the record that this is a matter of public concern." C.A. App. 4852.[6]

Respondents, again ignoring Petitioners' above-quoted brief to the court of appeals, question whether the Tenth Circuit's public concern inquiry even "raised a federal law issue." Opp. 14-15. But Respondents never explain how, in light of *Gertz*, the court of appeals could possibly have affirmed the award of punitive damages for defamation without finding actual malice unless it had concluded, *for purposes of the First Amendment*, that Petitioners' speech did not involve a matter of public concern. It is thus clear that the court below treated its public concern inquiry under the First Amendment (with respect to punitive damages) as coextensive with its

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[5] *See also* Petitioners/Appellants' 10th Circuit Court of Appeals Reply Brief ("Pet. C.A. Reply Br.") 12 ("If falsity alone could eliminate First Amendment protection, that would render meaningless [the *Gertz*] rule.").

[6] *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987), speaks only to an instance where the petitioner *proffered* a jury instruction only to argue in this Court that the instruction it advanced had *misstated* the law, and then compounded the waiver by failing to press that argument before the court of appeals. *See* 480 U.S. at 258-59.

public concern inquiry under Colorado law (with respect to defamation liability writ large), such that it disposed of the former in affirming the defamation award as a whole on the ground that actual malice need not be shown because Petitioners' speech did not involve a matter of public concern. *See* Pet. App. 31a-33a n.7.[7] The panel majority's citation to this Court's decisions, especially *Connick v. Myers*, 461 U.S. 138 (1983), addressing public concern in the First Amendment context, confirms as much. *See* Pet. 30a-31a.

Finally, Petitioners also squarely argued below that *Gertz* required reversal of the punitive damages awarded under the Federal Wiretap Act.[8] The panel majority expressly affirmed the Wiretap Act punitive damages on the ground "that the contents of the recorded telephone conversations were purely private matters, rather than matters of public concern. . . ." Pet. App. 55a.[9]

c. Respondents claim that *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979), held that "a general subject matter . . .

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[7] *Cf. Ohio v. Robinette*, 519 U.S. 33, 37 (1996) (When a state law question appears "to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.") (internal quotation omitted).

[8] *See* Pet. C.A. Br. 54 ("Punitive damages [under the Federal Wiretap Act] cannot be imposed for the false content of speech on a matter of public concern unless the factfinder determines both falsity and actual malice. . . .") (citing *Gertz*, 418 U.S. at 350); Pet. C.A. Reply Br. 11 ("Because the jury was never called upon to find falsity and actual malice by the ADL . . . with respect to the allegations in the Aronsons' complaint, the *post hoc* award of punitive damages [under the Wiretap Act] on that basis violates the First Amendment.") (citing *Gertz*).

[9] Respondents state that the court of appeals deemed this argument waived, before "alternatively and summarily reject[ing]" it. Opp. 24. To the contrary, the Tenth Circuit merely noted that "it was unclear" whether the point had been raised in the district court, expressly assumed that it had been, and rejected it on the merits. Pet. App. 55a; *see also infra* at 10. As this Court has repeatedly held, a question is preserved if pressed and passed upon before the court of appeals. *See* Pet. 14 n.9 (citing cases).

could not be invoked to transform a private matter into a public one." Opp. 16. In fact, *Hutchinson* addressed a very distinct question, one going to liability for compensatory damages rather than to the availability of punitive damages: whether a speaker can transform a *private figure* into a public one by virtue of the defamatory speech. 443 U.S. at 133-36. *Gertz*, not *Hutchinson*, addresses the question presented here. *Gertz* specifically held that, in determining whether speech involves an issue of public concern, the trial court must "put to one side the false character of the article and treat it as though its contents were entirely true," for it "would undermine the rule of [*New York Times v. Sullivan*] to permit the actual falsity of the statement to determine whether or not its publisher is entitled to the benefit of the [actual malice] rule." 418 U.S. at 330 n.4 (quoting and adopting lower court opinion).

Respondents deny that the circuits are split on this point. Their denial, however, is premised on a mischaracterization of the question presented here. Petitioners do not advance "the proposition that a court must decide, *based entirely upon the statements in isolation*, whether they are about a matter of public concern." Opp. 18 (emphasis added). Petitioners embrace the settled rule – consistently recited in both public employment and defamation cases – that the public concern inquiry turns on the speech's "content, form, and context . . . as revealed by the whole record." *Connick*, 461 U.S. at 147-48.[10] This inquiry must focus, other circuits have held, upon the "content, form, and context" of the defamatory speech *itself*, not on the supposed falsity of the statement and the fault attributable to the speaker. *See* Pet. 18-24.

Respondents also attempt to downplay the importance of the conflict, asserting that it merely affects the stage in the analysis in which the falsity of speech is considered, but does

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[10] Respondents' contention that public concern analysis somehow differs in the public employment as opposed to the defamation context is foreclosed by *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-62 (1985) (plurality opinion), a defamation case, which cited and applied the test developed in *Connick*, a public employment case.

not affect the result of any case. Opp. 20. But if the Tenth Circuit's rule denying First Amendment protection to negligently false speech had been applied in the cited public employee cases, the employee-speakers, each of whom prevailed under the First Amendment, would have had nothing to fall back on other than factual claims that their speech was true (or not *negligently* false).[11] And if the punitive damages issue in *this case* were decided in any of the other cited circuits, it clearly would have come out differently. Respondents observe that this Court has yet to resolve the split originally identified by the Ninth Circuit "in light of three subsequent decisions [of the First, Fifth, and Sixth Circuits] that directly raise the issue," Opp. 20, but they neglect to mention that this Court's review was not sought in any of those cases. Finally, Respondents do not deny that the conflict on the question presented here persists among the state courts. *See* Pet. 20-21 n.13.

2. The decision below grossly distends the punitive damages provisions of the Federal Wiretap Act, and that issue independently warrants certiorari review.[12]

a. Respondents say that Petitioners "never claimed below that good faith reliance [on law enforcement] presented an issue of law" with respect to punitive damages under the Wiretap Act. Opp. 28. To the contrary, Petitioners argued in terms that "a defendant's good faith belief in the lawfulness of his conduct negates, *as a matter of law*, a finding of willfulness or maliciousness necessary to justify . . . punitive damages for violating the wiretap act." Pet. C.A. Br. 51 (emphasis added)

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[11] *See Johnson v. Multnomah County*, 48 F.3d 420, 423 (9th Cir. 1995); *Chappel v. Montgomery County Fire Prot. Dist. No. 1*, 131 F.3d 564, 576-77 (6th Cir. 1997); *Denton v. Morgan*, 136 F.3d 1038, 1043 (5th Cir. 1998); *Brasslett v. Cota*, 761 F.2d 827, 834 (1st Cir. 1985).

[12] Respondents' assertion that the "majority, if not all, of the [Aronsons'] interceptions were illegal," Opp. 5, contradicts, without any citation whatever, the district court's indisputably correct finding that "the vast majority of intercept[ions] . . . occurred prior to October 25, 1994," and thus were *perfectly legal* under the Act. Pet. App. 143a.

(citing and quoting the same passage from *Deal v. Spears*, 980 F.2d 1153, 1159 (8th Cir. 1992), quoted at Pet. 27). The court below squarely rejected this argument on its merits. *See* Pet. App. 50a-53a. The Eighth Circuit in *Deal* stated unequivocally that, "although the Spearses' reliance on the officer's statement does not absolve them of liability, it clearly demonstrates that the taping was neither wanton nor reckless" so as to permit punitive damages under the Wiretap Act. Here, it was undisputed that Petitioners likewise received assurances from law enforcement (who obtained and used the Aronsons' recordings in their own criminal investigation and prosecution throughout the relevant period), that using the intercepted conversations was indeed legal under the Wiretap Act, *see* Pet. 8, 27, yet the Tenth Circuit refused to follow the Eighth Circuit's holding that such reliance barred the imposition of punitive damages as a matter of law.

b. Respondents assert that Petitioners have not previously "argue[d] that the Federal Wiretap Statute prohibits the award of punitive damages for . . . 'defamatory use' of illegally intercepted communications." Opp. 26. But Petitioners argued to the court of appeals that "[s]electivity . . . in framing the allegations of a court pleading – the basis on which the [District] Court sustained the punitive damages award – is in no way connected to the purpose of the pertinent provisions of the federal wiretap statute," and that "impos[ing] a punitive damages award on the basis of conduct unrelated to . . . the federal statute is to improperly permit punishment of which the public is not given notice by this statute." Pet. C.A. Br. 54, 55.[13] The court of appeals mistakenly deemed this argument waived – before holding, in the alternative, that it "has no merit" – on the belief that "it was not raised in the district court." Pet. App. 56a & n.17. However, the argument (i) *was* advanced in the district court, *see* C.A. App. 1362-63 ("whether

[13] The argument appears in a section of Petitioners' Tenth Circuit brief headed "Due Process," but that hardly transforms the plainly statutory assertion quoted in the text into "wholly different constitutional challenges," as Respondents claim. Opp. 26.

the [Aronsons'] Complaint was or was not defamatory is completely irrelevant to the . . . Wiretapping Act"); *see also id.* 759, 1283-85, 1357-61, and (ii) in any case *specifically responded* to the district court's *post-judgment interjection* of a defamation rationale in affirming punitive damages under the Federal Wiretap Act. *See* Pet. 14 n.9. This question therefore is properly presented for this Court's review.

As to the merits of the question, Respondents offer a litany of speculative reasons why they think punitive damages might be justified. *See* Opp. 27-28. But none of them goes to the relevant issue: Petitioners' state of mind *specifically with respect to knowledge that they were violating the Act. See* Pet. 28-29.[14]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

February 9, 2004

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[14] Although *Smoot v. United Transp. Union*, 246 F.3d 633, 648 (6th Cir. 2001), cited *both* an intent to injure reputation *and* the defendant's notice of illegality as grounds for affirming a punitive damage award under the Act, only the Tenth Circuit has affirmed such an award "notwithstanding a defendant's undisputed good faith with respect to its violation of the Act." Pet. 28 n.17.